Supreme Court, U.S.
FILED

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No. ____

In The

Supreme Court of the United States

ARTHUR WILLIAM BOYNE,

Petitioner,

v.

MICHAEL W. MOORE, Secretary of the Florida Department of Corrections; and ROBERT A. BUTTERWORTH, Attorney General of the State of Florida,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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44 pp

QUESTION PRESENTED

Whether a certificate of appealability (COA) should issue to review the validity of a procedural order that obstructs a petition and arbitrarily denies first time meaningful habeas review of federal claims, when the district court requires two claims to be abandoned completely by limiting the number allowed filed; and by limiting the facts allowed per claim; and by prohibiting use of any exhibits to support the claims?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Arthur William Boyne, appearing pro se, who is serving a sentence of life in prison without becoming eligible for parole for twenty-five years, as a result of having pled guilty to first degree murder on February 11, 1993. For the first year-and-a-half he was incarcerated in Arizona State Prison pursuant to a plea agreement and was returned to Florida prison on August 29, 1994, where he is currently incarcerated. The custodian respondent is Michael W. Moore, Secretary of the Florida Department of Corrections. However, originally when the petition was filed in district court it was Michael P. Szczecina, Warden of Century Correctional Institution, and was changed to Mr. Moore when the Petitioner was transferred to Walton Correctional Institution and his motion to change the name to the real party in interest was approved on May 5, 2000. The second respondent is Robert A. Butterworth, Attorney General of the State of Florida.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Rule 29.4(b) Statement	1
Constitutional Provisions Involved	2
Statutory Provisions Involved	2
Statement	4
Habeas Corpus Proceedings	4
Procedural Obstruction of Habeas Corpus	11
Florida Courts – State and Federal	17
Reasons for Granting the Petition	18
The Suspension Clause	18
The Question Presented is Important	19
Conclusion	23

TABLE OF AUTHORITIES

Page

CASES

Ashwander v. T.V.A., 297 U.S. 288 (1936) 22

Barefoot v. Estelle, 463 U.S. 880 (1983) 20

Boyne v. State, case no. 94-525-CIV-ORL-18 (M.D.Fla. 1994) 11

Boyne v. State, case no. 99-080-CIV-ORL-18B (M.D.Fla. 1999) 11

Bundy v. Wainwright, 808 F.2d 1410 (11th Cir. 1987) 14

Davis v. Adult Parole Authority, 610 F.2d 410 (6th Cir. 1979) 18

Dobbs v. Zant, 506 U.S. 357 (1993)..... 15

Ferrero v. Associated Materials Inc., 923 F.2d 1441 (11th Cir. 1991)..... 14

Goulahy v. Ford Motor Co., 118 F.3d 1478 (11th Cir. 1997)..... 15

Heiderschied v. Singletary, case no. 95-791 (M.D. Fla. 1995) 11

In Re Hillsborough Holding Corp., 127 F.3d 1398 (11th Cir. 1997)..... 13

McFarland v. Scott, 512 U.S. 849 (1994) 13

Pitney Bowes Inc. v. Mestre, 701 F.2d 1365 (11th Cir.) cert. denied 464 U.S. 893 (1983)..... 6

Richardson v. Honda Motor Co. Ltd., 686 F.Supp. 303 (M.D. Fla. 1988) 14

Santobello v. New York, 404 U.S. 257 (1971)..... 16

Schlup v. Delo, 513 U.S. 298 (1995) 21

TABLE OF AUTHORITIES – Continued

Page

Slack v. McDaniel, 529 U.S. ___, 120 S.Ct. 1595 (2000) 18, 20, 22

Smith v. Frank, 923 F.2d 139 (9th Cir. 1991) 17

Stutson v. United States, 516 U.S. 193 (1996) .. 17, 22, 23

Telfel v. Reno, 180 F.3d 1286 (11th Cir. 1999) 13

CONSTITUTION

U.S. CONST. art. 1, § 9, cl.2 ..... 2, 18, 23

U.S. CONST. amend. V 2, 19

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 1291, 1292 6

28 U.S.C. § 2253(c) 3, 19, 20, 21, 22, 23

28 U.S.C. § 2254 ..... 4, 18, 19

28 U.S.C. § 2254(f) 2, 14

28 U.S.C. § 2403(a) 1

Rule 2(c), Rules Governing Section 2254 Cases 2, 3, 12

Rule 7(c), Rules Governing Section 2254 Cases 7, 15

Model Form for use in 28 U.S.C. § 2254 Cases 12

Antiterrorism and Effective Death Penalty Act of 1996 19

First Judiciary Act, § 14, 1 Stat. 81-82 (1789) 18

U.S Sup. Ct. Rule 29.4(b) 1

TABLE OF AUTHORITIES – Continued

Page

Fed.R.Civ.P. 59(e) 13

I.O.P. – 2, foll. 11th Cir. R. 11-4..... 15

M.D. Fla. Local Rule 3.01(c)..... 5

OTHER AUTHORITIES

Black's Law Dictionary 4th Ed. (1951)..... 14

Pensacola News Journal p. 8c (11/20/99) 17-18

Robert P. Sokol, *Federal Habeas Corpus* 91-93 (1969) 12

Charles Allen Wright, *Procedures for Habeas Corpus*, 77 F.R.D. 227, 238 (1978)..... 12

PETITION FOR WRIT OF CERTIORARI

Arthur William Boyne respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a) is unreported. The earlier opinions and orders of the court of appeals and United States District Court (App. infra, 2a-14a) are unreported.

JURISDICTION

The court of appeals entered its judgment on October 2, 2000 (App. infra, 2a). The judgment on petition for rehearing en banc or rehearing, construed as a motion for reconsideration, was entered on December 14, 2000 (App. infra, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE 29.4(b) STATEMENT

The provisions of 28 U.S.C. § 2403(a) may apply to this case and notification required by Rule 29.4(b) has been made.

CONSTITUTIONAL PROVISIONS INVOLVED

Article One, Section 9, Clause 2 of the United States Constitution provides as follows:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or invasion the public Safety may require it.

U.S. Const. art. 1, § 9, cl. 2.

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> . . . No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. V.

STATUTORY PROVISIONS INVOLVED

Title 28 of the U.S. Code, Section 2254(f) provides in pertinent part as follows:

> If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency to support such determination. . . .

28 U.S.C. § 2254(f).

Rule 2(c) of the Rules Governing Section 2254 Cases provides in pertinent part as follows:

> (c) Form of petition . . . It shall specify all the grounds for relief which are available to the Petitioner and of which he has or by the exercise or reasonable diligence should have knowledge and set forth in summary form the facts supporting each of the grounds thus specified. . . .

Rule 2(c) of the Rules Governing Section 2254 Cases.

Title 28 of the U.S. Code Section 2253(c) provides in pertinent part as follows:

> (c)(1) Unless a circuit court justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) The final order in a proceeding under Section 2254.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

STATEMENT

This case arises from a petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (petition) filed October 1, 1999, by Arthur William Boyne (Petitioner) to challenge the constitutional validity of his guilty plea to first degree murder and sentence of life in prison by the Florida State court's (Doc. 1).

HABEAS CORPUS PROCEEDINGS

The petition raised six claims and contained a total of 58 pages including the required form, 37½ of which were additional pages of pure facts sequentially inserted into the form to support the claims. The claims raised were: (1) denial of access to the courts; (2) (a) breach of agreement not to be sent to prison; (b) breach of agreement to serve sentence out-of-state; (3) plea was involuntarily based on coercion, threats and an actual in-courtroom beating immediately prior to entering plea; (4) both the court's and State's failure to establish a factual basis for the element of premeditation at the plea hearing; (5) conflict of interest with defense counsel; (6) ineffective assistance of counsel, because: (a) he coerced Petitioner to plead guilty; (b) his failure to urge or investigate a voluntary intoxication defense. Accompanying the petition were six volumes of exhibits, consisting entirely of the State court record cited to and relied on in the claims. Also filed with the petition was a Motion to Seal (Doc. 4); and in an abundance of caution, Motion to Allow Additional Pages of Facts Within Petition (Doc. 2).

On October 6, 1999, Magistrate Judge Baker summarily denied both motions and struck the petition as being in violation of Local Rule 3.01(c) by holding it incorporated into it a memorandum of law more than twenty pages in length (Aff., *infra*, 3a), despite the fact no caselaw was cited and no memorandum of law was filed and the petition contained only facts (Doc. 5).[1]

The Order also directed the Petitioner under threat of dismissal to refile the petition within eleven (11) days using only the local form and to briefly summarize the claims on the form itself (App., *infra*, 3a). This limited the Petitioner to four claims instead of six and limited the facts to support each claim to 6 to 10 lines each, requiring two claims to be abandoned completely. The two claims abandoned were: denial of access to the courts; and conflict of interest with defense counsel. Three blank forms were included with the Order, that also directed the Clerk to return the stricken petition (App., *infra*, 3a). No mention was made of the six volumes of exhibits, nor were they or the petition returned to the Petitioner.

On October 20, 1999, Petitioner filed Written Objections to the Magistrate's Order (Doc. 10); and a Motion to Alter or Amend judgment, accompanied by an individually tabbed and indexed appendix to support the argument, that included as exhibits for comparison purposes both the striken petition (tab 1) and a bare-bone petition using only the form (tab 1/2), that raised only four claims (instead of six) and used only the space permitted in the

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[1] Included with the petition was a letter to the Clerk requesting that the exhibits be docketed separate from the petition.

form for facts (6 to 10 lines), but did cite to and rely on the still unreturned trial record contained in the exhibits filed with the original petition (Doc. 8).

Instead of treating the bare-bone petition as an exhibit (tab 1/2) the district court mischaracterized it as an amended petition and filed it separately (Doc. 7), and on November 22, 1999, denied both Written Objections and the Motion to Alter or Amend Judgment (Doc. 13). On November 30, 1999, Magistrate Judge Baker issued an Order to the Respondents to show cause why the (bare-bone) amended petition should not be granted and to file copies of the Petitioner's State postconviction appellate briefs (Doc. 14). The Respondents' Response and Appendix containing the briefs were filed on December 16, 1999 (Doc. 21). In their Response the Respondents concede both that the petition was timely filed and that all the claims raised were exhausted in the State courts.

On December 6, 1999, the Petitioner filed a notice of appeal with the filing fee for interlocutory appellate review (Doc. 15); and an application for a COA (Doc. 17); and Motion To Stay Proceedings Pending Resolution of Appeal citing to original exhibits in both (Doc. 16), that were both denied on December 14, 1999 (Doc. 20). Petitioner then filed a request for a COA to the Eleventh Circuit (Case No.: 99-1511-E), who requested the parties address the following jurisdictional question:

> Whether the district court's November 22, 1999, Order is immediately appealable? *See* 28 U.S.C. §§ 1291, 1292; *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1368 (11th Cir.) *cert. denied* 464 U.S. 893 (1983).

On April 11, 2000, the Eleventh Circuit held they lacked jurisdiction at that time and dismissed the appeal.

On January 10, 2000, the Petitioner filed his Traverse to the Answer (Doc. 28); and a Motion for Evidentiary Hearing or Fact Development Procedures Short of the Hearing and cited to the original exhibits (Doc. 27). This motion was denied without prejudice on January 25, 2000 (Doc. 30). Petitioner filed Motion to Compel Admission of Law to Fact, citing to original exhibits (Doc. 31), that was denied without opinion on January 31, 2000 (Doc. 32).

On May 5, 2000, the district court Ordered the Respondents to file a complete copy of the transcript of the Plea and Sentencing Hearing held on February 11, 1993 (Doc. 41). On May 25, 2000, the Petitioner filed a motion requiring Respondents to serve copy of the transcript upon him also, in order that he might admit or deny its correctness in accordance with Rule 7(c) Rules Governing Section 2254 Cases (Doc. 43). The district court granted this motion on May 30, 2000 (Doc. 44), and a copy of the transcript was served on Petitioner by Respondents on June 2, 2000 (Doc. 42). Upon reviewing the transcript Petitioner discovered it was both incomplete and factually inaccurate. The time shown which the hearing was conducted as 9:00 A.M. (Transcript p. 1) should be 4:00 P.M., the time the hearing was scheduled and actually conducted. This time difference is pertinent in ascertaining what proceeding was being held at the time the Petitioner was physically attacked in the courtroom, since it was omitted from the transcript filed by the Respondents, but what took place both before and after is included (Transcript, p. 4, between lines 4 & 8):

> THE COURT: We're not starting. We've still got another case before this one. We're trying to resolve other matters that were scheduled.
>
> MR. KIMBALL: All right.
>
> (other matters were heard at this time.)
>
> THE SERGEANT: What's the problem? I wasn't here.
>
> THE COURT: Well, the problem is that Mr. Boyne just got attacked. . . . (Transcript, p. 4, lines 1-11).
>
> This attack is confirmed several places in the transcript.
>
> MR. MORGAN: Your honor, I talked to my client, and he indicates he does not wish to pursue charges against punching him in court . . . (Transcript, p. 17).
>
> THE COURT: Mr. Edge, I was not witness to all that transpired, but I take it at some point you managed to strike Mr. Boyne . . . (Transcript, p. 18).

On June 9, 2000, at 5:00 A.M., five working days after receiving the transcript the Petitioner mailed/filed Objection – Motion for Order Directing the Respondents to Correct the Transcript (Doc. 49).

During a telephone conversation on June 7, 2000, with Ms. Jan McClung, Deputy Clerk of the District Court, the Petitioner was informed that the six volumes of exhibits he requested docketed separately, were instead docketed with the original petition and stricken when the petition was stricken and they would be returned to the Petitioner. On June 8, 2000, Petitioner

filed Motion to Refile Exhibits and Affidavits in Opposition to Motion for Summary Judgment (Doc. 48).

On June 9, 2000, the district court denied all the claims in the bare-bone petition on the merits and dismissed it with prejudice, without the benefit of sufficient facts or the exhibits or a complete transcript, or reference to the Traverse to the Answer (Doc. 46). (App., *infra*, 5a-13a). However, the order did not hold any of the claims defaulted or procedurally barred (App., *infra*, 5a-13a).

On June 20, 2000, the exhibits were returned to the Petitioner. On the same day a Motion to Alter or Amend Judgment accompanied by the recently returned exhibits, as Appendix A-F, was overnight filed/mailed back to the district court (Doc. 52). This time however, the Clerk did docket the exhibits separate from the petition (Doc. 53).

On June 22, 2000, Petitioner received an order that denied without opinion both the Motion to Refile the Exhibits and Affidavits in Opposition to Motion for Summary Judgment; and Objection-Motion for Order Directing Respondents to Correct Transcript (Doc. 51), and then received an Order dated June 21, 2000, that denied without opinion Motion to Alter or Amend Judgment, which is the same day the district court received it (Doc. 54).

On June 21, 2000, the Petitioner filed notice of appeal with another $105.00 filing fee (Doc. 55), and an application for COA (Doc. 56). In the application the Petitioner raised the procedural errors made by the district court in striking the original petition and exhibits; and filing as an amended petition an appendix to another pleading, that

was then denied without a complete transcript or sufficient facts or support of the exhibits and without two claims required abandoned as a result. The application also in the opinion of the Petitioner made a substantial showing of the denial of a constitutional right on each of the underlying claims. The district court held otherwise when it denied the COA (Doc. 58) (App., *infra*, 14a).

On July 21, 2000, the District Court Clerk sent the initial appeal package to the Eleventh Circuit, which included the docket sheet on appeal. This was not sent to the Petitioner, who, however, filed Directions to the Clerk on July 24, 2000, requesting that the original striken petition and exhibits be included in the record on appeal (Doc. 57). A request for COA was sent to the Eleventh Circuit on August 15, 2000, and also Designations to the Clerk of District Court were filed at the same time that requested the entire record on appeal be sent (Doc. 60). This was followed by a letter to Deputy Clerk McClung who confirmed this, both by reply and telephone that they were included. However, the docket sheet shows that the total record sent contained only "2 volumes of pleadings; 3 volumes of exhibits", but since the appendix submitted by the Respondents was at least 3 volumes and the Petitioner's exhibits are 6 volumes alone, they were obviously not sent. Plus, there is no confirmation that the transcript was sent either. On October 2, 2000, a single Eleventh Circuit Judge denied the request for a COA without benefit of the exhibits (and possibly the transcript), for a failure to make a substantial showing of the denial of a constitutional right. (App., *infra*, 2a). Petitioner timely filed fifteen (15) copies of Petition for Rehearing En Banc; or Rehearing that was construed as a

motion for reconsideration and denied by two judges of the Eleventh Circuit on December 14, 2000, for the same reason (App., *infra*, 1a). As a result of the petition being construed as a motion for reconsideration the 15 copies sent to the Clerk were not distributed to all members of the court to vote for en banc review as intended.

PROCEDURAL OBSTRUCTION OF HABEAS CORPUS

The question presented in this case involves the complete procedural obstruction of a Petition for Writ of Habeas Corpus by the district court that denied the Petitioner the ability to obtain first time meaningful habeas review of his federal claims. Resolution of this question will have a substantial impact on thousands of Petitioners in this country and especially those in the Middle District of Florida, Orlando Division, where this is an established custom.[2] This obstruction took place at every stage of the habeas proceeding including the request for a COA made

[2] This is the third habeas petition of this Petitioner that Magistrate Judge Baker has procedurally obstructed. First, he dismissed a petition in 1994 for not conforming to the requirements of in forma pauperis, when the U.S. District Court in Arizona had previouly granted it in the same case, on top of which the filing fee had been paid. Case no. 94-525-CIV-ORL-18 (M.D. Fla. 1994). Second, he construed a pre-habeas motion as a petition until the District Judge corrected it via a Rule 59(e) motion, case no. 99-080-CIV-ORL-18B (M.D. Fla. 1999). As a prison law clerk for seven years Petitioner has seen this same obstruction in every petition filed in Orlando. *See, Heiderscheid v. Singletary*, Case No. 95-791 (M.D. Fla. 8/10/95).

to the Court of Appeals. Magistrate Judge Baker was wrong when he struck the petition by characterizing it as having incorporated into it a memorandum of law over twenty pages long (App., *infra*, 3a). No memorandum was filed and no caselaw was cited, and the additional 37½ pages contained only facts. The instructions on the cover sheet at § 2 of the Model Form annexed to the Rules Governing Section 2254 Cases authorizes this: ("The facts (not case citations) which you rely upon to support your grounds for relief may be set forth on additional pages.") *See, McFarland v. Scott*, 512 U.S. 849, 856 (1994) ("Habeas corpus petitions must meet heightened pleading requirements, see, 28 U.S.C. § 2254 Rule 2(c),") *see*, Rule 2(c), *supra*, p. 3. *Cf.* Charles Allen Wright, *Procedures for Habeas Corpus*, 77 F.R.D. 227, 238 (1978) ("Wholly anachronistic to preserve fact pleading for habeas corpus petitions, which are ordinarily prepared by persons unrepresented by lawyers and often poorly educated, while far less exacting pleading requirement is made for ordinary civil actions."); *see*, Ronald P. Sokol, *Federal Habeas Corpus*, 91-93 (1969) ("Kinship between habeas corpus petition and appellate brief and the recommendation in factual text length/substance suggest a more extensive presentation than once thought appropriate.") Without question, the order striking the petition also required it refiled using only the local form and no additional pages were permitted (App., *infra*, p. 3a). This limited the presentation of facts to 6-10 lines per claim, which is insufficient. This also required two claims to be abandoned completely, because the striken petition raised six claims and the form only allows four. This is contrary to the requirements of Rule 2(c), *supra*, p. 3. *Also see*:

> [O]ur carefully crafted doctrines of waiver and abuse of the writ makes it especially important that the first petition adequately set forth all of a State prisoner's colorable grounds for relief. Indeed, Congress expressly recognized "the seriousness of the possible penalty and . . . the unique and possible nature of the litigation."

McFarland v. Scott, 512 U.S. 849, 860 (1994) (O'Conner, J., concurring in judgment in part) (emphasis added). Petitioners have a right and duty to raise every claim for relief available to them in their first petition and the district court lacks the authority to restrict them.

Particularly offensive is the manner in which the district court mischaracterized an exhibit to a Rule 59(e) motion and filed it as an amended petition, when it was clearly indexed, tabbed and referenced as an exhibit. Then, almost immediately issued a show cause order. Whereas, had it been treated as an exhibit to the Rule 59(e) motion that was denied, it would have permitted an amended petition to be filed. This was an abuse of discretion. *See, In Re Hillsborough Holding Corp.*, 127 F.3d 1398, 1401 (11th Cir. 1997). ("An abuse of discretion occurs if the judge fails to apply the proper legal standard or follow proper procedures in making the determination."); and *Tefel v. Reno*, 180 F.3d 1286, 1299 (11th Cir. 1999) ("The necessary first step in evaluating any procedural due process claim is determining whether a constitutionally protected interest is implicated.") Since the Suspension Clause is implicated this is clearly a due process violation. *Supra*, p. 2.

Especially damaging to the petition was the district court's failure to docket the exhibits separately as

requested. Then as a result striking them when the petition was struck, and refusing to refile, consider or return them until after the petition they were produced to support was dismissed, and also not sending them to the court of appeals to support the request for a COA.

These exhibits substantiated entitlement to relief on every claim.[3] 28 U.S.C. § 2254(f) authorizes, indeed requires an applicant if able, to produce that part of the record pertinent to determination of the petition. *Supra*, p. 2. *Accord, Bundy v. Wainwright*, 808 F.2d 1410, 1414 (11th Cir. 1987) ("The Structure for Pleading Habeas Corpus Cases"). This obstructed Petitioner's ability to procedurally enforce his right to habeas review in contravention of the Due Process Clause. *Supra*, p. 2. *See, Richardson v. Honda Motor Co. Ltd.*, 686 F.Supp. 303, 304 (M.D. Fla. 1988) ("A substantive law creates, defines and regulates rights as opposed to procedural or remedial law which proscribes a method of enforcing the rights or obtaining redress for their invasion. Black's Law Dictionary, 4th Ed. (1951)."); *Accord, Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1445 (11th Cir. 1997).

The district court abused its discretion by refusing to correct the transcript of the Plea and Sentencing Hearing,

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[3] These exhibits consisted entirely of State trial court postconviction record and were professionally bound, tabbed and indexed into six volumes for easy reference, and contained 42 exhibits, including 11 affidavits, numerous pleadings and orders and other documents, i.e., an Executive Order from Governor Chiles disqualifying the State Attorney; confirmation of an agreement for second degree murder; confirmation that Petitioner testified for State against eleven (11) murderers; and a copy of the Plea and Sentencing Hearing transcript.

especially after granting petitioner's motion to receive and review a copy for that purpose in accordance with Rule 7(c), Rules Governing Section 2254 Cases. *See, Dobbs v. Zant*, 506 U.S. 357, 358 (1993) ("We hold that the Court of Appeals erred when it refused to consider a full sentencing transcript.") *Cf., Goulahy v. Ford Motor Co.*, 118 F.3d 1478, 1483 (11th Cir. 1997). This correction was necessary to produce missing portions of transcript that detailed the dialogue that took place at the time the Petitioner was being attacked in the courtroom, immediately prior to pleading guilty to first degree murder. This hearing was televised, but the State of Florida has failed to produce their copy of the videotape. Therefore, all portions of the transcript that substantiate the fact that the Petitioner was coerced to plead guilty are essential, even though it is confirmed in other places in the transcript. *See, supra*, p. 8. In fact, since the District Court Clerk failed to send a copy of the docket sheet on appeal as requested by the Petitioner, and required by I.O.P. – 2, foll. 11th Cir. R. 11-4, it is not certain that the transcript was included in the record at all.

The transcript also confirms that both defense attorney Mr. Morgan, and the State of Florida promised the Petitioner that if he pled guilty he would serve his sentence out-of-state for his protection, which agreement was breached when he was returned to Florida after spending a year-and-a-half in Arizona:

> MR. MORGAN: . . . He will be sentenced, under the plea agreement . . . he will be placed in a facility pursuant to the interstate corrections program. There's a letter from Mr. Porter who runs that program, which I believe has been

> attached to the plea agreement. (Transcript, pp. 5-6).
>
> THE COURT: Has anyone, including your attorney, in any way promised you anything other than what's been stated here in court today to get you to enter this plea?
>
> THE DEFENDANT: That I would be incarcerated and moved to another State. (Transcript, pp. 9-10).
>
> MR. MORGAN: Your Honor, point of clarification, if I may. You will set this – indicate that the sentence is to be served under the interstate compact program. (Transcript, pp. 16-17).

See, Santobello v. New York, 404 U.S. 257, 262-63 (1971) ("When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration such promise must be fulfilled.")

Every claim raised was factually substantiated in the stricken petition and proven by record documented evidence contained in the exhibits. *Supra*, p. 4. And, the Petitioner did make a substantial showing of the denial of a constitutional right on each claim, even in the erroneously filed amended petition, in both the district court and the court of appeals, but was denied consideration of his facts and exhibits. Otherwise, a COA would have issued.

What proved fatal to the petition was the seemingly deliberate manner in which the district court conducted each procedural maneuver. *See*, Habeas Corpus Proceedings, *supra*, pp. 4-11. The timing and sequence of each procedural act or omission made it impossible for the

Petitioner to receive first time meaningful habeas review of his federal claims. The Petitioner was unfairly procedurally overwhelmed:

> When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights to which the important public interest in judicial efficiency and finality must occasionally be accommodated . . . and procedural accomodation to prisoners are familiar aspect of our jurisprudence.

Stutson v. U.S., 516 U.S. 193, 196-97 (1996); *accord, Smith v. Frank*, 923 F.2d 139, 142 (9th Cir. 1991) ("Plaintiff is prevented from fully pursuing his rights not because of his untimeliness, but because of the length of his pleading and the operation of a local rule. Such an interpretation would give the local rule an impermissible jurisdictional character.")

FLORIDA COURTS – STATE AND FEDERAL

The recent presidential election and the great Florida recount, which highlighted the second millennium, demonstrated what can take place when dealing with the Florida judicial system. The Petitioner is an unrepresented Florida state prisoner who was unconstitutionally convicted and sent to prison. His only hope of vindication of his constitutional rights lies in his right to a Writ of Habeas Corpus in the federal courts. He has been denied this right by the Middle District of Florida. Recently U.S. Senator Robert Graham addressed this issue: ("for too long the 400-mile-long Middle District has

been shackled by overcrowded court dockets and the result has been less justice for everyone.") (Pensacola News Journal, p. 8c 11/20/99.) *Accord, Slack v. McDaniel*, 529 U.S. ___, ___, 120 S.Ct. 1595, 1603 (2000) ("Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal.") This was established law in the Sixth Circuit two years before the Eleventh Circuit's existence:

> Our review of pertinent Supreme Court decisions and other authorities persuade us that a rule which would permit a court to dismiss an action for habeas corpus relief without consideration of the equeties presented renders the habeas corpus process inadequate to test the legality of a person's conviction and, thereby, constitutes a prohibited suspension of the writ . . . .

Davis v. Adult Parole Authority, 610 F.2d 410, 414 (6th Cir. 1979).

REASONS FOR GRANTING THE PETITION

THE SUSPENSION CLAUSE

The right to the Writ of Habeas Corpus was established in this country when the Constitution was enacted in 1787 by the Suspension Clause contained in Article One, U.S. Const. art. 1, § 9, cl. 2. *Supra*, p. 2. However, the rules governing the habeas are defined by statutory language. Statutes and Supreme Court cases over the years have established the court's jurisdiction over habeas and defined its scope. See, First Judiciary Act, § 14, 1 Stat. 81-82 (1789). 28 U.S.C. § 2254 provides for federal court

review of a state prisoner's claim that he or she is being held in violation of the constitution. The rules that govern procedures in district courts on applications made under 28 U.S.C. § 2254 are contained in Rules Governing Section 2254 Cases. The provisions of 28 U.S.C. § 2253(c), *supra*, p. 3, govern appeals taken from the district court's dismissal of a habeas corpus petition. The fairness in which procedures are applied by federal courts to a petition for Writ of Habeas Corpus is protected under the Due Process Clause, U.S. Const. amend. V, *supra*, p. 2. The most recent statutory change in habeas corpus law is the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The purpose of AEDPA among other things is to expedite the finality of convictions and not to repeal, obstruct or suspend the right to the Writ of Habeas Corpus. No change in law in 214 years has disturbed the Suspension Clause. It remains the law of the land. *Supra*, p. 2.

THE QUESTION PRESENTED IS IMPORTANT

> Whether a COA should issue to review the validity of a procedural order that obstructs a petition and arbitrarily denies first time meaningful habeas review of federal claims, when the district court requires two claims to be abandoned completely by limiting the number allowed filed; and by limiting the facts allowed per claim; and by prohibiting use of any exhibits to support the claims?

The actual question is, is the validity of the district court's procedural order that is the direct cause of a

habeas corpus petition being dismissed appealable. This is because under 28 U.S.C. § 2253(c) a Petitioner is required to obtain a COA before an appeal may be taken from the denial of a habeas corpus petition. *Supra*, p. 3. In this case the district court's procedural rulings, acts and omissions are the reason the COA was denied, even though the request for a COA made a substantial showing of the denial of a constitutional right on each underlying claim as required by 28 U.S.C. § 2253(c) (1994 ed., Supp. III) *supra*, p. 3, as specifically defined in *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). The court of appeals did not review and consider two claims, sufficient facts, a complete transcript, or any of the exhibits produced with the original petition, because as a result of the district court's procedural rulings they were not included and sent with record on appeal.

The Court resolved a similar question recently in *Slack v. McDaniel*, 529 U.S. ___, 120 S.Ct. 1595 (2000) regarding the circumstances under which a COA may issue to review the validity of a procedural ruling made by the district court when the petition is denied on procedural grounds without reaching the underlying constitutional claim.[4] In the instant case the question concerns the circumstances under which a COA may issue to

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[4] . . . We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 120 S.Ct. at 1604.

review the validity of the district court's procedural order that prevents claims, facts, and exhibits from being included in the petition when it is filed and then denies the underlying claims on the merits.

Based on his petition being denied on procedural grounds *Slack* did not attempt to make a substantial showing of the denial of a constitutional right, nor could he, because the district court did not reach his underlying claims. Whereas, in the instant case the court of appeals denied the COA because the district court's procedural rulings prevented the Petitioner from making a substantial showing of the denial of a constitutional right on his underlying claims.[5] Therefore, according to the federal courts below neither *Slack* nor the instant Petitioner made a substantial showing of the denial of a constitutional claim on their underlying claims as required by 28 U.S.C. § 2253(c), *supra*, p. 3.

Over the years whenever habeas law has changed this Court has developed a proper application of the statutory language, *see*, *Schlup v. Delo*, 513 U.S. 298, 319 n.35 (1995) ("This Court has repeatedly noted the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence.") AEDPA is such a change in

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[5] The Petitioner did make a substantial showing of the denial of a constitutional right on his underlying claims, and but for the district court's procedural rulings a COA would have issued. This is supported by the fact that the decision denying the COA is in direct conflict with decisions of this Court, other court of appeals, and their own court on each claim.

habeas law which this Court is in the process of developing a proper application. In *Slack, supra,* 120 S.Ct. at 1599, the court applied the *Ashwander* rule to resolve the case, which allows and encourages the court to first resolve procedural issues. *Ashwander v. TVA,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.") Based on this principle of law the court found that the district court's procedural ruling concerning *Slack's* abuse of the writ was wrong, and remanded for consideration of whether a COA should issue.

In this case the district court's procedural rulings completely obstructed the Petitioner's ability to obtain first time meaningful review of his federal claims, and completely obstructed his ability to obtain COA. This means that because of the requirements of 28 U.S.C. § 2253(c), *supra,* p. 3, no appeal may be taken, because the court of appeals did not issue a COA. In *Stutson v. U.S.,* 516 U.S. 193 (1996), this Court resolved a similar situation where appellate review was not available and granted certiorari; vacated judgment; and remanded (GVR):

> *Cf. Adams v. United States, ex rel. McCann,* 317 U.S. 269, 274, 63 S.Ct. 236, 239, 87 L.Ed. 268 (1942) "But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts." *Ibid.* In this case as in *Lawrence v. Carter,* a GVR order guarantees to the petitioner full and fair consideration of his rights in light of all pertinent considerations, and also satisfactory to the Government. In this

> case, as in *Lawrence*, a GVR order promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it.

Stutson v. U.S., 516 U.S. at 197.

Under the circumstances the question presented in this case, and thousands of similar cases, is the logical next one this Court should resolve. This is necessary, because under these circumstances the requirements of 28 U.S.C. § 2253(c) are in direct contravention of the provisions of the Suspension Clause of the Constitution of the United States, U.S. Const. art. 1, § 9, cl.2, *supra*, p. 2.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ARTHUR WILLIAM BOYNE, Pro Se

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-13854-G

ARTHUR WILLIAM BOYNE,

Petitioner-Appellant,

versus

MICHAEL P. SZCZECINA, as
Warden Century Correctional,
ROBERT A. BUTTERWORTH,
Attorney General of the
State of Florida, et al.,

Respondents-Appellees.

Appeal from the United States District Court for the
Middle District of Florida

Before BLACK and MARCUS, Curcuit [sic] Judges

(Filed Dec. 14, 2000)

BY THE COURT:

Appellant's "petition for rehearing en banc" is construed as a motion for reconsideration of this Court's order dated October 2, 2000. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-13854-G

ARTHUR WILLIAM BOYNE,

Petitioner-Appellant,

versus

MICHAEL P. SZCZECINA, as
Warden Century Correctional,
ROBERT A. BUTTERWORTH,
Attorney General of the
State of Florida, et al.,

Respondents-Appellees.

Appeal from the United States District Court for the
Middle District of Florida

(Filed Oct. 2, 2000)

ORDER:

Appellant's motion for a certificate of appealability is DENIED for failure to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(20

/s/ EMMETT R. COX
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ARTHUR WILLIAM BOYNE

Petitioner,

v. CASE NO. 99-1253-CIV-ORL-22B

MICHAEL P. SZCZENCIA, et al.,

Respondents.

ORDER

(Filed Oct. 6, 1999)

This case is before the Court on the following matters:

1. Petitioner has filed a habeas petition pursuant to 28 U.S.C. section 2254 (Doc. No. 1, filed October 1, 1999). However, the habeas petition incorporates a memorandum of law that exceeds twenty pages in length in violation of Local Rule 3.01(c). Consequently, the habeas petition is STRICKEN and shall be returned to Petitioner by the Clerk of the Court. Within eleven (11) days from the date of this Order, Petitioner shall refile his habeas petition on the appropriate form. Petitioner should briefly summarize his claims on the form itself. Petitioner may file a *separate* accompanying memorandum of law that shall not exceed twenty pages in length. The failure to fully comply with this Order will result in the dismissal of this action without further notice.

2. Petitioner's Motion to Allow Additional Pages of Facts Within Petition (Doc. No. 2, filed October 1, 1999) is **DENIED.**

3. Petitioner's Motion to Seal (Doc. No. 4, filed October 1, 1999) is **DENIED.** Documents filed prior to trial may only be sealed by the Court based on a showing of extraordinary circumstances. *Brown v. Advantage Engineering, Inc.*, 960 F.2d 1013 (11th Cir. 1992). Petitioner has not shown extraordinary circumstances in this case. The Court notes that there is no indication that Petitioner is presently incarcerated under an assumed name.

DONE AND ORDERED in Chambers at Orlando, Florida, this 5th day of October, 1999.

/s/ David A. Baker
DAVID A. BAKER
UNITED STATES
MAGISTRATE JUDGE

Copies to:
pslc 10/5
Arthur William Boyne

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ARTHUR WILLIAM BOYNE

Petitioner,

v. CASE NO. 6:99-cv-1253-Orl-22B

MICHAEL P. SZCZENCIA, et al.,

Respondents.

ORDER

(Filed June 9, 2000)

Petitioner initiated this action for habeas corpus relief pursuant to 28 U.S.C. section 2254. Upon consideration of the petition, the Court ordered Respondents to show cause why the relief sought in the petition should not be granted. Thereafter, Respondents filed a timely reply to the petition for writ of habeas corpus in compliance with this Court's instructions and with the *Rules Governing Section 2254 Cases in the United States District Courts* (Doc. No. 21, filed December 16, 1999).

Petitioner alleges four claims for relief in his habeas petition: first, that the State "breached" the terms of his plea agreement; second, that his plea of guilty was involuntary; third, that he received ineffective assistance of counsel; and fourth, that the State and the trial court "failed to establish premeditation factual basis."

Procedural History

Petitioner was charged by indictment with first degree murder. Petitioner subsequently entered into a plea agreement in which, among other matter, he agreed to enter a plea of guilty to first degree murder. The trial court held a hearing on the plea and ultimately accepted it. The trial court then adjudicated Petitioner guilty of first degree murder and sentenced him to imprisonment for a term of natural life, with a minimum mandatory sentence of twenty-five years. Petitioner did not file a direct appeal.

Petitioner next filed a motion to withdraw his plea of guilty with the state trial court, which was denied. Petitioner appealed the denial, and the state appellate court affirmed *per curiam*. The Supreme Court of Florida denied Petitioner's request for discretionary review.

Petitioner then filed a petition for writ of habeas corpus with the state appellate court, which was denied.

Petitioner next filed a motion for postconviction relief with the state trial court. Prior to a ruling on that motion, Petitioner filed an amended motion for postconviction relief with the state trial court, which was denied. Petitioner appealed the denial, and the state appellate court affirmed the denial *per curiam*. Finally, Petitioner filed a petition for writ of habeas corpus with the Supreme Court of Florida, which was denied.

Claim One

Petitioner contends that the State breached the terms of his plea agreement by failing to ensure that 1) Petitioner received probation as a sentence, and 2) Petitioner served his sentence in an "out-of-state" prison.

Petitioner's plea agreement provided, in relevant part, as follows: "The prosecutor, based upon my identity and my criminal record disclosed on the record by or in my presence, has recommended: Life imprisonment. Shall serve no less than 25 years before becoming eligible for parole. Interstate compact agreement." Petitioner also acknowledged in his plea agreement that he understood that the trial judge was not bound to follow any recommendations of the prosecutor: "I fully understand that the Judge is not bound to follow any recommendations or agreements of the prosecutor as to sentence or disposition and that the Judge has made no promise or agreement as to what I will receive as a sentence or disposition herein. . . . " At the plea hearing, Petitioner stated that he understood that he would receive a sentence of life imprisonment with a minimum mandatory sentence of twenty-five years. (Transcript of Plea Hearing at 8.)

It is readily apparent that Petitioner understood the sentence he would receive in this case: imprisonment for a term of natural life with a minimum mandatory sentence of twenty-five years. There is no indication whatsoever that Petitioner was promised a sentence of probation.

Moreover, at the plea hearing, the issue of Petitioner being placed in an out-of-state prison pursuant to an

"interstate compact agreement" was discussed by the trial court:

> THE COURT: I don't know that I have the authority to do that. I can make the recommendation and request that DOC still place him pursuant to what they have initiated thus far, but that's the extent.

Id. at 17. Thus, the issue of Petitioner being placed in an out-of-state prison pursuant to an "interstate compact agreement" was presented to the trial court, and the trial court agreed to and eventually did make such a recommendation to the Department of Corrections. In fact, the record reflects that Petitioner was placed in a state prison in Arizona for a period of time and that Petitioner was later transferred back to a state prison in Florida because Petitioner sought access to Florida legal materials and to the Florida courts.

It is clear that this claim is without merit and that it must be denied.

Claim Two

Petitioner avers that his plea of guilty was involuntary because 1) his counsel threatened him with "physical harm unless [he] pled guilty," 2) he was assaulted at the plea hearing by a relative of the victim, and 3) the State withheld evidence of Petitioner's intoxication at the time of the offense.

Issues one and two are without merit. In the plea agreement itself, Petitioner specifically acknowledged as follows: "No one has pressured or forced me to enter the Plea(s), no one has promised me anything to get me to

enter the Plea(s) that is not represented in this Written Plea. I am entering the Plea(s) voluntarily of my own free will because . . . I believe that I am guilty." At the plea hearing, the following colloquy occurred:

> THE COURT: Mr. Boyne, has anyone forced or pressured you into entering this plea today?
>
> THE DEFENDANT: No.

(Transcript of Plea Hearing at 9.) Thus, it is apparent that Petitioner was not coerced, threatened, or pressured to enter into his plea.[1]

The Court also rejects Petitioner's argument that the State withheld evidence of Petitioner's intoxication at the time of the crime. Under the plea agreement, Petitioner indicated that he understood that he was "waiving any right to present any defenses [he] may have to the charges."

Claim Three

Petitioner alleges that he received ineffective assistance of counsel because of the following: 1) counsel

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[1] As the Supreme Court held in *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977), "the representations of the defendant [at the plea hearing], as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." Petitioner has not made a sufficient showing to refute the veracity of his responses in this Court or the weight his plea should be accorded in this Court.

coerced him into entering a plea of guilty; and 2) counsel failed to pursue a voluntary intoxication defense.

1. Legal Standard

In *Hill v. Lockhart*, 474 U.S. 52, 58 (1985), the Supreme Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." The Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. The first prong of the *Strickland* test requires that the defendant demonstrate that counsel's performance was deficient and "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The second prong of the *Strickland* test requires the defendant to show that the deficient performance prejudiced the defense. *Id.* at 687. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance. *Id.* at 689-90.[2]

2. Issue One

As discussed above, it is readily apparent that Petitioner was not coerced into entering a plea of guilty. Consequently, Petitioner has not demonstrated that he

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[2] In order to satisfy the prejudice requirement of the two-prong test forth in *Strickland*, Petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59 (footnote omitted).

received ineffective assistance of counsel with regard to this matter.

3. Issue Two

The decision of whether to pursue a defense is a strategic decision. As noted by the Eleventh Circuit Court of Appeals in *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994):

> The Supreme Court has mandated a highly deferential review of counsel's conduct, especially where strategy is involved. Intensive scrutiny and second-guessing of attorney performance are not permitted. Because it is a wide range of performance that is constitutionally acceptable, the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between. Cases in which deliberate strategic decisions have been found to constitute ineffective assistance are even fewer and farther between. *This case is not one of them.*

(Citations omitted) (quotations omitted) (emphasis added). Petitioner has presented no facts that demonstrate, with any degree of certainty, that a jury would have found him innocent of the charges based on his proposed defense. Since this defense was, at best, only a theoretical possibility, counsel was not obligated to pursue this defense. *See United States v. Stewards*, 879 F. Supp. 502 (E.D. Pa.) (since the intoxication defense was at best only a theoretical possibility, the petitioner's attorney had been under no obligation to inform his client of it), *affirmed without opinion*, 70 F.3d 1258 (3rd Cir. 1995).

Therefore, the Court determines that counsel's conduct was reasonable with regard to this issue and that Petitioner has not demonstrated prejudice.

Claim Four

Petitioner argues that "[t]he State and Court failed to establish premeditation factual basis."

At the plea hearing, the State set forth in detail the facts on which it intended to rely on if the case proceeded to trial. (Transcript of Plea Hearing at 11.) The trial court found that "there [was] sufficient factual basis for acceptance of [the] plea." *Id.* at 12. Certainly, in the present case, there was a sufficient factual basis supporting Petitioner's plea of guilty. The Court also notes that, in the plea agreement, Petitioner waived any requirement that the State establish on the record a factual basis for the charge to which he pled. Consequently, this claim must be denied.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus filed by Arthur William Boyne is **DENIED**, and this case is **DISMISSED WITH PREJUDICE.** The Clerk of the Court shall enter judgment accordingly.

2. The Clerk of the Court is directed to close this case.

DONE AND ORDERED in Chambers at Orlando, Florida, this 8th day of June, 2000.

/s/ Anne C. Conway
ANNE C. CONWAY
UNITED STATES
DISTRICT JUDGE

Copies to:
pslc 6/8
Counsel of Record
Arthur William Boyne

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ARTHUR WILLIAM BOYNE,

Petitioner,

v. Case No. 6:99-cv-1253-Orl-22B

MICHAEL P. SZCZENCIA, et al.,

Respondents.

ORDER

(Filed July 25, 2000)

This case is before the Court on the following motion:

MOTION: PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY (Doc. No. 56)

FILED: July 21, 2000

THEREON it is **ORDERED** that the motion is **DENIED.**

Petitioner has not made a substantial showing of the deprivation of any federal constitutional right.

DONE AND ORDERED in Chambers at Orlando, Florida, this 24th day of July, 2000.

/s/ Anne C. Conway
ANNE C. CONWAY
UNITED STATES
DISTRICT JUDGE